

# **EXHIBIT E**

HIGHLY CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER

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IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

JAMES HAYDEN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No.
	)	1:17-cv-02635-CAB
2K GAMES, INC.and	)	
TAKE-TWO INTERACTIVE	)	
SOFTWARE, INC.,	)	
	)	
Defendants.	)	

HIGHLY CONFIDENTIAL - PURSUANT TO PROTECTIVE ORDER

The video recorded deposition of MICHAL A. MALKIEWICZ, called by the Defendants for examination, pursuant to Notice, and pursuant to the Rules of Civil Procedure for the United States District Courts, taken stenographically by Sandra L. Rocca, CSR, RMR, RDR, CRR, at 300 North LaSalle Street, Chicago, Illinois, on the 19th of August, 2021, at the hour of 9:11 a.m.

Job No.: 2864

1 your opinions are not relevant, right?

2 MR. McMULLEN: Objection, calls for a legal  
3 conclusion.

4 A I mean, they could be relevant if someone is  
5 interested in knowing what the value to Take-Two is  
6 of depicting tattoos realistically, but wouldn't be  
7 relevant to copyright infringement claims if  
8 copyrights are not valid or infringed.

9 Q You understand that there are different  
10 types of damages that can be recovered by a  
11 copyright owner in an infringement case, right?

12 MR. McMULLEN: Calls for a legal conclusion.  
13 You can answer.

14 A I'm generally aware as to the entitlement or  
15 what the Copyright Act says.

16 Q One type of copyright damages is called  
17 actual damages, is that right?

18 MR. McMULLEN: Same objection.

19 A Well, it's certainly one of the ways that  
20 one of the let's say three types of damages has been  
21 described has been called actual damages.

22 Q You don't have any opinions on whether  
23 Mr. Hayden suffered any actual damages in this case,  
24 right?

25 MR. McMULLEN: Objection, calls for a legal

1 conclusion. You can answer.

2 A That is fair. I don't -- that was not part  
3 of my assignment and I don't have an opinion or have  
4 not developed an opinion on it.

5 Q You've not identified any business  
6 Mr. Hayden lost, correct?

7 A Well, it's a little bit tautological. I  
8 have not analyzed any -- any of that kind of lost  
9 business opportunities, only in the context of if --  
10 my assumption is that there is a valid copyright  
11 infringement claim, then presumably, in the but-for  
12 world there would have been a business relationship  
13 between the defendant and the plaintiff, but again,  
14 not in the context of actual damages. That's just  
15 sort of a tautological inference, I think.

16 Q In the context of actual damages, you have  
17 not identified any business Mr. Hayden lost,  
18 correct?

19 MR. McMULLEN: Objection, calls for a legal  
20 conclusion. You can answer.

21 A So yeah, I have not analyzed Plaintiff's  
22 actual damages in the form of lost profits, lost  
23 business opportunities or the other categories that  
24 may or may not be available to Mr. Hayden under the  
25 Copyright Act. My assignment was very specific in

1 precision such as, for example, consumer surveys.

2 Q You're not aware of any licenses related to  
3 use of tattoos in video games, true?

4 MR. McMULLEN: Objection, vague.

5 A Not sufficiently similar to the  
6 circumstances of this case. We've discussed at this  
7 deposition Take-Two, for example, licensing or  
8 hiring tattooists to provide new designs of tattoos  
9 as an example. There I -- you know, I'm aware of  
10 other video game franchises, not the NBA 2K, that  
11 has engaged in some licensing activity around  
12 tattoos like NFL Madden, for example. But as far as  
13 I recall, the financial information behind these  
14 transactions is not publicly available.

15 Q So you do not have any evidence of licenses  
16 related to the use of real world tattoos in video  
17 games, isn't that right?

18 MR. McMULLEN: Objection, vague, calls for a  
19 legal conclusion.

20 A Right. It was not part of my analysis  
21 per se, but I've seen quite a few licenses in this  
22 case and I have not -- at least none ring a bell as  
23 to ones that would be in the context of what you  
24 described, so the real-life tattoos licensed for a  
25 video game reproduction of an avatar.

1           Q   You're not aware of any licenses for the use  
2   of real world tattoos in video games to be  
3   reproduced on the person on whom they are inked in  
4   real life, right?

5           MR. McMULLEN:   Can I hear that back, please?

6           (Record read as requested.)

7           MR. McMULLEN:   Objection, vague, form.

8           A   Otherwise -- I'm sorry.   Other than the NFL  
9   Madden, sort of general knowledge of existence of  
10   such license, but not the actual details of it, I do  
11   not.

12          Q   Well, and your knowledge of a potential  
13   Madden license is only based on speculation, right?

14          A   It's based on market research.

15          Q   But you have not seen anyone from EA who has  
16   said we have a license, right?

17          A   Not that I recall, but I wouldn't be  
18   surprised either way.   It was not a focus of my  
19   analysis.

20          Q   It's not just that you don't recall.   You  
21   have not seen anyone from EA saying they licensed  
22   the tattoos in their game, right?

23          A   It is that I don't recall.   I mean, I've  
24   seen references to that topic.   It's possible that  
25   there was some discussion with a company